Supreme Court, U.S.
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No. 93-7901

In The

Supreme Court of the United States

October Term, 1994

LLOYD E. SCHLUP, JR.,

Petitioner,

v.

PAUL DELO, Superintendent
Potosi Correctional Center,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Respondent and its amici present no persuasive reason the Court should overrule *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), and the cases which have held that its standard governs claims of true innocence like Lloyd Schlup's. Nor do they defend the "miscarriage of justice" standard actually used by the Eighth Circuit Court of Appeals in rejecting Mr. Schlup's claim because there was some evidence the jury could have credited which implicated him in Arthur Dade's murder. *See* J.A. at 174-75, Pet. Brief at 35-36.[1] Their legal arguments are adequately addressed in Petitioner's Brief and need no reply. We are constrained to respond to respondent's attack on the evidence that supports Mr. Schlup's claim of innocence.

The evidence tendered in support of Mr. Schlup's claim of innocence includes:

(1) direct and circumstantial evidence in support of his defense of alibi;

(2) direct and circumstantial evidence that Randy a/k/a Rocky Jordan and not petitioner helped Robert O'Neal kill Arthur Dade;

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[1] Respondent says the second question on which certiorari was granted in this case "is not ripe for review" "[b]ecause the Court of Appeals did not cite or rely on *Jackson [v. Virginia*, 443 U.S. 307 (1979)]." (Resp. Brief 35). This argument is transparently without basis in this Court's jurisprudence, which "does not depend on citation to book and verse," *Eddings v. Oklahoma*, 455 U.S. 104, 103 n.9 (1982) – especially in federal cases, where the Court's jurisdiction is plenary. 28 U.S.C. § 1254(1).

Respondent says nothing on the merits of this point – neither explaining how the Court of Appeals' analysis can be distinguished from the *Jackson* standard, nor arguing that the *Jackson* standard is consistent with *Sawyer v. Whitley*, 112 S.Ct. 2514 (1992).

(3) direct and circumstantial evidence that the state's key witnesses lied to the jury.[2]

Through no fault of Mr. Schlup's (See Pet. Brief at 7-9), this substantial evidence of Mr. Schlup's innocence has never been heard in any court. Therefore, much of respondent's argument is based upon speculation and incorrect interpretation of many of the witness affidavits.

Respondent's claim that "all inmates interviewed either stated that they did not see the stabbing or informed the investigators that they would not state what they saw" (Resp. Brief 2) is refuted by the record. Several inmates admitted to the investigators that they saw the crime, and freely answered what few questions they were asked. (J.A. 31, Respondent's Exhibit T, Exhibits 1A, 2, 14). Though respondent states that several of these inmate statements were provided to trial counsel, (Resp. Brief at 11 n.7), trial counsel provided an affidavit stating that he

> . . . has never seen or been provided any oral or written statements by any inmate who was present in the housing unit at the time of Arthur Dade's stabbing who admitted to having seen the homicide or who stated that Mr. Schlup was not involved. . . . Affiant had no discovery whatsoever from the state that indicated that any person other than corrections officers Flowers and Maylee had seen the stabbing of Arthur Dade. If affiant had such reports in his possession or if he had read such reports, he would remember it because this information would have been very important to Mr. Schlup's defense.

(Exhibit 9C, p. 2). Trial counsel did not interview any witnesses who were known to be present at the scene of the crime. (J.A. 11) His only effort in this regard was his unsuccessful attempt, in Robert O'Neal's presence, to depose Ricky McCoy. It is not surprising that, in the presence of the actual killer, McCoy refused to admit that he saw the murder.

Though a number of inmates refused to cooperate with prison investigators, the race-related gang tensions in the housing unit at the time of the murder suggest that they remained silent for fear of reprisal. (J.A. 31, 33, 93-94). In light of testimony and evidence that the stabbing took place on a crowded cell block, it is not reasonable to believe that only four prisoners saw the murder. For example, although Joe Beck told investigators that he was in his cell putting away his broom, he said he did not see the murder. (Resp. Brief 34). All testimony and physical evidence shows that Dade was stabbed directly in front of Beck's cell; Beck could not avoid seeing the crime. (Pet. Brief Appendix 1).

Respondent's attacks on the credibility of Lamont Griffin and Ricky McCoy are based upon misstatements of the record. Respondent states: "Griffin's affidavit also claims that Sgt. Flowers grabbed the wrong guy although he told investigators that Sgt. Flowers grabbed the one who threw the liquid in Dade's face." (Resp. Brief 35). Griffin's affidavit actually says, "The first thing I saw of

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[2] Respondent does not explain his allegation that petitioner presents "two mutually exclusive theories for his actual innocence." (Resp. Brief 31.) Mr. Schlup's sole defense is that he is completely innocent.

the fight was Rodney Stewart throw liquid in Arthur Dade's face, . . . after I saw O'Neal throw the knife out the window, I saw Flowers come onto the walk and then I saw him grab Stewart." (Exhibit No. 1, pp. 2-3). There is no contrary statement in his affidavit. Respondent claims that "McCoy's present affidavit contradicts both his statement to investigators and his testimony during his deposition." (Resp. Brief 35) There is no affidavit in the record from McCoy, although he is available to testify.[3]

Respondent claims that Emmett Nave, Dave Corcoran and Darnell Duckett "were not even housed on walks one through four," citing as authority for this his own counsel's statement to the district court that "these individuals were not housed in the *same walk* in which the stabbing occurred." (J.A. 18, emphasis added). Respondent's own Exhibit T establishes that these witnesses were in fact occupants of the housing unit where Arthur Dade was stabbed, and Exhibit 8 indicates that Duckett was one of the prisoners who admitted having seen the stabbing. (J.A. 31).

Although Rodney Stewart continues to assert his innocence of the murder of Dade, his statement to investigator Larry Bodinson is particularly trustworthy because it is clearly against Stewart's penal interest. Stewart told Bodinson that he participated in discussions between Robert O'Neal and Rocky Jordan planning the homicide of Arthur Dade, and that O'Neal had asked him to assist

[3] There are only two statements in the record from McCoy. In February, 1984, McCoy told investigators that he saw O'Neal and Stewart attack Dade. At his deposition, McCoy refused to repeat his account in O'Neal's presence. (Exhibit 2).

in the murder. He was present at the scene of the crime, and saw Jordan hold Dade while O'Neal stabbed him. (Exhibit 16).

With respect to John Green, there is no inconsistency between his statement to investigators, his testimony in the Stewart trial and his affidavit describing his telephone call to base control. In his interview with the prison investigators on February 8, 1984, Green was not asked how long it took him to make the telephone call nor was he asked this question in the Stewart trial.[4] (Exhibit 4A). There is no conceivable reason for Green to lie about the phone call in February of 1984; he could not have known about the video tape or the importance of his phone call to the case. (J.A. 36, 91). The record shows that Green has only once been asked how long it took him to make the call, and his only response was that he did so within seconds of Arthur Dade hitting the floor. (J.A. 122). Respondent also does not explain how Green's testimony is inconsistent with Faherty's affidavit. Together, they show that Mr. Schlup was not at the scene of the crime.

Green explained that he denied having seen the murder on earlier occasions because he feared reprisal. (J.A. 124). Now that he is out of prison, "he is no longer afraid to let the truth be known." (J.A. 148). Green identified a photograph of Rocky Jordan as "the man who held Arthur Dade while O'Neal stabbed him," a photograph of Robert O'Neal as "the man who stabbed Dade while

[4] In Stewart's trial the timing of the telephone call was not at issue because Stewart was caught at the scene.

Jordan held him," and a photograph of Rodney Stewart as "the man Sgt. Flowers took downstairs after Dade was stabbed." (J.A. 112, 126-29). Neither Green nor any other eyewitness to the crime has truly been tested by the crucible of cross examination.

Respondent's attempt to discredit former prison Captain Robert Faherty is also based upon a misinterpretation of the record. Faherty does not claim that he "stopped petitioner for three minutes." (Resp. Brief 39). Faherty's affidavit obviously covers the time interval which includes Mr. Schlup entering the T-3 corridor at the head of the line, walking most of the length of the 100 yard corridor, stopping at the window and being reprimanded for the same,[5] walking the remainder of the corridor and being subjected to a pat down search before continuing to the dining room.[6]

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[5] The state has claimed that Schlup's actions at the window are evidence of his complicity in the crime because the window was one floor below the window where O'Neal ejected the murder weapon. (Resp. Brief 5). However, the testimony at trial established that the area outside the housing unit was separated from the rest of the prison grounds by a high fence topped with razor wire, and any prisoner in the yard would have been escorted by a corrections officer. (Trial Tr. 314).

[6] It was prison policy to subject as many prisoners as possible to a pat-down search at the T-3 door. Faherty's affidavit is consistent with Schlup's statement to prison investigators, his testimony in the O'Neal trial and Faherty's own trial testimony. (Trial tr. 307). A pat-down search at that station is simply part of the prison routine; Bernard Bailey's testimony that nothing unusual happened on the way to the dining room cannot be construed to mean that no pat-down searches occurred. It is likely that Bailey and other inmates were likewise subjected to a pat-down search.

Faherty's trial testimony is ambiguous about how long he was with Mr. Schlup. Officer Faherty was asked how long he spent at the T-3 post in two separate contexts, first relating to the time between Faherty's arrival at his post and his encounter with Mr. Schlup (Trial Tr. 303), and second regarding the time between Mr. Schlup's departure and the arrival of the officer who relieved Faherty at the T-3 post. (Trial Tr. 307). Faherty explained that he "was never asked how long Lloyd and I were together in the hall." (Faherty Affidavit, p. 4). It was only the inaction of trial counsel that allowed the prosecutor to condense the three minute time span in which Lt. Faherty says he had Mr. Schlup in sight to the wholly implausible period of fifteen seconds respondent argues for.

Indeed, Respondent's whole ability to claim the trial evidence "demonstrated beyond a reasonable doubt that petitioner had sufficient time to participate in the murder and easily make it to the dining room to be the first in line for lunch," (Resp. Brief 31-32), is due solely to the inaction of trial counsel. Trial counsel neglected to use evidence in his possession to cross-examine or rebut the guards' testimony that the emergency radio call regarding the stabbing was not broadcast until 10 or 20 minutes after the murder.[7]

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[7] "Sgt. Flowers testified that approximately 5 to 10 minutes had elapsed from the time he first saw Stewart throw the steaming liquid in Dade's face until he met Capt. Eberle near base control." (Resp. Brief 3.) "Capt. Eberle stated that he radioed for help 5 to 10 minutes after first being informed [by Sgt. Flowers] that a disturbance had occurred." (Resp. Brief 5.)

The officers' own reports show that this testimony is wildly exaggerated. In his inter-office communication written the day of the murder, Roger Flowers said that he saw Stewart cross over from two walk to one walk at approximately 11:55 a.m.; Capt. Eberle wrote in his report that same day that he saw Roger Flowers with Rodney Stewart in his custody at approximately 11:55 a.m. Robert Faherty and other officers wrote in their reports that they responded to the distress call at 12:00 noon. (Exhibits 29, 31) The objective evidence indicates that only about 5 minutes lapsed between the time when Roger Flowers opened one walk and the time when dining room guards responded to the emergency call.[8] During this five-minute interval, Dade was attacked, Flowers apprehended Stewart, and the other two perpetrators fled – while Schlup, in sight of Lt. Robert Faherty, walked to the lunchroom ahead of all the other inmates.[9]

Because guards were posted at several points en route to the dining room, it would have been impossible for Mr. Schlup to run to the head of the line without

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[8] Dade was stabbed in a maximum security housing unit in which there were more than half a dozen corrections officers, two telephones and two clerks. Respondent's theory that it took ten to twenty-one minutes for anyone to call for help is simply not plausible.

[9] Schlup's position at the head of the line is probative of his innocence. Although respondent states that "after all the [Walk 2] inmates stepped out of their cells, [Flowers] proceeded to release the inmates on Walk 1," (Resp. Brief 3), Flowers actually waited and "watched all the inmates go from two walk except two or three or four" before moving over to the one walk master lever. (Trial tr. 267).

being seen. Contrary to respondent's suggestion, petitioner need not account for "the fact that O'Neal was able to slip past the guards responding to the murder from the dining room unnoticed." (Resp. Brief 32-33). The evidence at trial was that O'Neal was noticed by at least two guards, Dan Bower (Trial tr. 181) and Larry Farris (Trial tr. 320), as he was running to the dining room. Because of O'Neal's suspicious behavior and the blood on his clothes,[10] Farris turned and followed him into the dining room. (Trial tr. 325-26) Furthermore, when O'Neal was running to the dining room, all of the guards had left their posts and were running in the direction of the housing unit. When Mr. Schlup walked to the dining room, the guards were standing at their posts.

Mr. Schlup has consistently asserted his innocence since the day that Arthur Dade was killed, when he gave a statement that is remarkably consistent with the evidence he has long asked his attorneys to investigate and present to the courts. (Exhibit 18). At his own sentencing hearing, he referred to Officer Faherty as a key witness in his defense. (Trial Tr. 690). In every pro se petition for relief, Mr. Schlup has named the witnesses who told prison investigators that they saw the crime, and he has named the actual participants in the crime. Virtually every surviving occupant of housing unit five swears that Mr. Schlup was not even present at the stabbing of Arthur Dade. (Pet. Brief, Appendix 1). Their

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[10] Although respondent correctly points out that O'Neal sustained a large laceration on his hand after breaking the glass to dispose of the murder weapon, laboratory reports revealed the presence of Arthur Dade's blood on his clothing (J.A. 104-05).

testimony is corroborated by a video tape supporting Mr. Schlup's defense of alibi and by laboratory tests which revealed no trace of blood on Schlup's clothing. The substantial body of evidence that Schlup tendered in support of his claim of actual innocence is far from "commonplace" (Resp. Brief 40).

CONCLUSION

The case for Mr. Schlup's innocence is truly exceptional; it at least warrants a hearing. The judgment of the United States Court of Appeals for the Eighth Circuit summarily rejecting it should be reversed.

Respectfully submitted,

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